IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/04/2006

CORAM

THE HON'BLE MR. JUSTICE P.K. MISRA
AND
THE HON'BLE MRS. JUSTICE CHITRA VENKATARAMAN

W.P.NO.26975 of 2002
WP.39564, 39583 of 2005
and 15158 of 2002
and
WPMP.Nos.29393 to 29396, 42049,42416 and 42432 of 2005
W.P.No.26975 of 2005

1. Sharath Kumar Rath
No.94, Lakshmana Salai,
K.K. Nagar, Chennai 78.

2. Saroj Kumar Sadangi,
A29/3, Anna Nagar East,
Chennai 102.

3. Parameswaran Satyam
No.97/G, (MB Flats)
Lakshmana Salai, K.K. Nagar,
Chennai 78. .. Petitioners

-Vs-

1. The Central
Administrative Tribunal
rep. by its Registrar,
City Civil Court Buildings,
Chennai 104.

2. The Union of India,
rep. by the Secretary to Government,
Department of Revenue, North Block,
New Delhi.

3. The Chairman,
Central Board of Excise and Customs
Department of Revenue,
Ministry of Finance, New Delhi 1.

4. The Chief Commissioner of Customs,
Custom House, Chennai. .. Respondents

W.P.No.39564 of 2005

T.S. Jayachandar,
Deputy Commissioner of Customs
and Central Excise,
11, 51th Street, Ashok Nagar,
Chennai 600 083. .. Petitioners

Vs.

1. The Central Administrative Tribunal
rep. by its Registrar,
City Civil Court Buildings,
Chennai 104.

2. The Union of India,
rep. by the Secretary to Government,
Department of Revenue, North Block,
New Delhi.

3. The Chief Commissioner of Customs,
Custom House, Chennai.

4. C. Ramkumar
Deputy Commissioner of Customs,
Custom House, Chennai.

5. K.M. Nagarajan,
Deputy Commissioner of Customs,
Vallalar Road, Manchakuppam,
Cuddalore.

6. M. Chandra Bose,
Deputy Director of Customs and
Central Excise,
Directorate of Systems, SRU,
Nungambakkam, Chennai 34.

7. K. Venkata Ram Reddy
Deputy Commissioner of Central Excise,
Vinayaga Marga Siddartham Nagar,
Mysore 570 011. .. Respondents

W.P.No.39583 of 2005
1. The Chennai Customs Appraising
Officers Association,
Rep. by its Secretary,
R. Prakash, Appraiser,
Custom House, Chennai.

2. Parvathi Kailasam,
Deputy Commissioner of Customs,
Custom House, Chennai.

3. T.H. Rao,
Deputy Commissioner of Customs,
Custom House, Chennai.

4. Bertsie Sundaram,
Deputy Commissioner of Central
Excise, Chennai 90. .. Petitioners

Vs.
1. The Central Administrative Tribunal
rep. by its Registrar,
City Civil Court Buildings,
Chennai 104.

2. The Union of India,
rep. by the Secretary to Government,
Department of Revenue, North Block,
New Delhi.

3. The Chief Commissioner of Customs,
Custom House, Chennai.

4. C. Ramkumar
Deputy Commissioner of Customs,
Custom House, Chennai.

5. K.M. Nagarajan,
Deputy Commissioner of Customs,
Vallalar Road, Manchakuppam,
Cuddalore.

6. M. Chandra Bose,
Deputy Director of Customs and
Central Excise,
Directorate of Systems, SRU,
Nungambakkam, Chennai 34.
7. K. Venkata Ram Reddy
Deputy Commissioner of Central Excise,
Vinayaga Marga Siddartham Nagar,
Mysore 570 011. .. Respondents

W.P.No.15158 of 2002
A. Cletus .. Petitioners

Vs.

1. The Union of India,
rep. by the Secretary,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi 1.

2. The Commissioner of Customs,
Custom House, 33, Rajaji Salai,
Chennai 1.

3. V.B. Yuvaraj
4. Mrs. Bertsie Sundaram
5. Mrs. Tamilmani Sriram
6. K. Ramesh,
7. B. Ramesh Kumar
8. P.S. Uma Mahesh
9. A.M. Madhusudara Rao
10. M.J. Baby Rao
11. O.P. Phalgunan,
12. P. Shantharam
13. N. Ravichandra
14. V. Sukumar
15. The Registrar,
Central Administrative Tribunal,
Madras Bench,
Chennai 104. .. Respondents

W.P.No.26975 of 2005 is filed under Article 226 of the Constitution of India for the issuance of Certiorarified Mandamus to call for the proceedings of the Central Administrative Tribunal, Madras Bench, the 1st respondent herein in O.A.No.566/2005 dated 9.8.2005 and quash the same and consequently direct the respondents 2 to 4 to finalise and circulate the seniority list of Appraisers in the light of the objections made by the petitioners before making promotions to the post of Assistant Commissioner of Customs and Central Excise (Group A) Post.
W.P.No.39564 of 2005 is filed under Article 226 of the Constitution of India for the issuance of Certiorari to call for the proceedings of the 1st respondent Tribunal in O.A.No.408/2005 dated 9.8.2005 upholding the validity of the impugned seniority list of Appraisers circulating in F.No.23011/1/2004-AD.II A dated 16.12.2004 of the 2nd respondent and quash the same.

W.P.No.39583 of 2005 is filed under Article 226 of the Constitution of India for the issuance of Certiorari to call for the proceedings of the 1st respondent Tribunal in O.A.No.419/2005 dated 9.8.2005 upholding the validity

of the impugned seniority list of Appraisers circulating in F.No.23011/1/2004-AD.II A dated 16.12.2004 of the 2nd respondent and quash the same.

W.P.No.15158 of 2002 is filed under Article 226 of the Constitution of

India for the issuance of Certiorari to call for the proceedings of the respondent Tribunal in O.A.No.833/1999 dated 17.10.2000 and consequentially to quash the seniority list issued by the 1st respondent in his proceedings F.A.23011/1/96 AdII(A) dated 12.11.1997 in so far as the fixation of seniority of Respondents 3 to 14 and to direct the 1st respondent to refit the seniority of the respondents 3 to 14 taking into account of the actual date of their regularisation in the grade of Appraiser and consequentially to direct the first respondent to promote the petitioner to the grade of Assistant Commissioner with effect from the date on which his junior respondents 4,8,9 and 10 were promoted as Assistant Commissioners and quash the same.

!For Petitioner : Mr.R. Thiagarajan,
in WP.Nos.26975, Senior Counsel for
39564 & 39583/2005 Mr.V. Vijay Shankar

^For Petitioner : Mr.Sathish Parasaran for
in WP.No.15158/02 Mr.N. Kannan

For Respondents 2to4: Mr.V.T. Gopalan
in WP.No.26975/05 & Addl.Solicitor General for
Respondents 2 & 3 in Mr.S. Udhaya Kumar, SCGSC
WPs.39564 & 39583/05

For Respondents 4 to7: Mr.J. Srinivasa Mohan
in WPs.39564 &39583/05

For Respondents 1-2 : Mr.R. Santhanam
in WP.No.15158/02
Respondents 4 &10 : Mr.V. Parthiban for
M/s.Paul & Paul

Respondents 5,7,13 &15: No Appearance
Respondent-8 : Mr. Ashok Menon for
M/s. Menon & Goklaney

Respondents 3,6,9,11, Notice Dispensed with
12 & 14 : vide order dt.23.1.2006

:COMMON JUDGMENT

P.K. MISRA, J

W.P.Nos.39564, 39583 & 26975 of 2005 have been filed against the common order dated 9.8.2005 passed by the Central Administrative Tribunal, (hereinafter referred to as the Tribunal) in O.A.Nos.408, 419 and 566 of 2005 respectively. O.A.No.408 of 2005 was filed by one T. S. Jayachander, presently working as Deputy Commissioner of Customs. O.A.No.419 of 2005 was filed by the Chennai Customs Appraising Officers Association, represented by its Secretary along with three other applicants, namely, Parvathi Kailasam, T.H. Rao, Bertsie Sundaram, who are also working presently as Deputy Commissioner of Customs, Chennai. O.A.No.566 of 2005 was filed by Sharat

Kumar Rath, Saroj Kumar Sadangi and Parameswaram Satyam, who are working as appraisers. In O.A.Nos.408 & 419 of 2005, the Union of India and the Chief Commissioner of Customs were arrayed as Respondents 1 & 2 and in O.A.No.566 of 2 005 they were arrayed as Respondents 1 & 3. The Chairman of Central Board of Excise and Customs was not arrayed as Respondent in O.A.Nos.408 & 419 of 2005, but was arrayed as Respondent No.2 in O.A.No.566 of 2005. In such O.A., there was no other private respondent, whereas in O.A.Nos.408 and 419 of 2005, four Deputy Commissioners of Customs were arrayed as Respondent Nos.3 to 7. All such applicants, who are the writ petitioners in three writ petitions, namely, W.P.Nos.39564, 39583 & 26975 of 2005, are promotee appraisers under the Customs Department, whereas Respondents 3 to 7 in O.A.Nos.408 & 419 of 2005 are the direct recruit appraisers. For convenience, the applicants/writ petitioners in three Writ Petitions, namely, W.P.Nos.26975, 39564 & 3 9583 of 2005 are referred to as "the promotees" and the private respondents in O.A.Nos.408 & 419 of 2005 are referred to as " the direct recruits", whereas Union of India and other subordinate officials are referred to as "the official respondents".
W.P.No.15158 of 2002 arises out of order dated 17.10.2000 in O.A.No.833 of 1999. Such Original Application was filed by direct recruits. The applicant / Petitioner No.4 in O.A.No.419 of 2005 corresponding to W.P.No.39583 of 2005, was Respondent No.4 in O.A.No.833 of 1999. The other respondents in the said O.A. / writ petitions are not parties in the matter relating to O.A.Nos.408, 419 & 566 of 2005. However, they are the respondents in W.P.No.15158 of 2002.

2. The main question in all the writ petitions relates to question of seniority in the cadre of Appraisers in Custom House, Chennai. The perennial fight is between direct recruits and the promotees. The fight for the first time reached the Supreme Court about four decades back. The Supreme Court at that stage was concerned with the Rules and Procedure relating to recruitment and seniority of direct recruits and promotees on the basis of executive instructions. The question related to seniority of those appraisers who are appointed from 15.8 .1947. Ultimately, the Supreme Court in the decision reported in AIR 1967 SC 52 (MERVYN COUTINHO v. COLLECTOR OF CUSTOMS), held that quota system was operating rotationally and seniority should be followed on the basis of quota and rotation, irrespective of continuous length of service of the promotees. In the meantime, the Rules framed under Article 309 of the Constitution known as the Customs Appraisers Service, Class II Recruitment Rules, 1961, came into effect. Rules 3 & 4 of 1961 Rules, being relevant, are extracted hereunder :-

Rule 3.
Recruitment to the Service shall be made by any of the following methods :-
(a) By competitive examination in India in accordance with Part III of these rules.
(b) By promotion in accordance with Part IV of these rules. (c) By transfer of an Officer in Government Service in accordance with Part V of these rules.
(d) By direct recruitment by selection otherwise than by competitive examination in accordance with Part VI of these rules.

Rule 4
(a) No appointment shall be made to the Service or to any post borne on the cadre of the Service by any method not specified in Rule 3.

(b) Subject to the provisions of sub-rule (a), the Board shall determine the method or methods of recruitment to be employed for the purpose of filling in particular vacancies in the Service, as may be required to be filled during any particular period and the number of candidates to be recruited by each method.
(c) The percentage of posts to be filled by direct recruitment by competitive examination or by selection otherwise than by competitive examination shall not be less than 50 per cent of the total cadre of Appraisers. The remaining posts may be filled by any other method mentioned in rule 3.

3. The salient feature of the said Rules is that no particular quota was fixed for the promotees but, as per Rule 4(c) of the Rules, at least 50% of the vacancies are to be filled up by the direct recruits and the rest could be filled up from other sources including promotion. The effect of 1961 Rules on the question of seniority was directly in issue in GAYA BAKSH YADAV v. UNION OF INDIA AND OTHERS [(1996) 4 SCC 23]. Since such decision is the basis of the contention (or rather, the bone of contention) for both the parties, it is more appropriate to extract the

relevant portion of the judgment :-
14. Having travelled thus far let us take stock of the situation, try to grasp it and smoothen its rough edges:

(iii) As per mandate of Rule 4-C of the above Rules the percentage of posts to be filled by direct recruitment, either by competitive examination or by selection otherwise than by competitive examination, could not be less than 50% of the total cadre of Appraisers and the remaining posts could be filled up by any other method mentioned in Rule 3. 50% allocation is thus assured to direct recruits in the total cadre. They may get even more; there is no limit to it.

(iv) The above Rules expressly do not provide a fixed unalterable quota for the promotees (remaining sources), which can keep fluctuating.

(v) In the absence of specific quotas being fixed in the Rules it becomes evident that the quota rule stands discarded. When there is no quota provided in the Rules the rotational system cannot function.

(xiii) The Direct Recruit case is the amalgamation of all streams of thought, confluencing the entire case-law on the subject and given appropriate placement. Individual reference of each case as cited therein and at the bar need not be made herein. Reference may be had with advantage to the report in the Direct Recruit case.
(Other sub-paras are omitted as not necessary for the present case)

15. We are not expected to unsettle the principle of Mervyn Coutinho or to discover instances of the breaking down of the rotational rule on the basis of some anomalies having arisen, because of direct recruitment not keeping pace with the situations arising from time to time. We are equally not expected to discover any deemed relaxation of the Rule on the supposition of the quota rule having been broken down. We have to proceed on the supposition that in the respective Customs Houses, termed as cadres, there is no inter se dispute of seniority amongst the allocated direct recruit Appraisers and departmentally promoted Appraisers. The dispute is narrow and centres on the need to prepare an All-India seniority list. On every occasion when the Government of India has made an effort to draw one, its effort was thwarted by decisions in succession by the Bombay High Court, the Madras High Court and the Central Administrative Tribunal. The matter has again been left to the Government of India to devise a proper principle for drawing a combined seniority

list and the placement of the respective personnel on that list.

16. We must bear in mind and strive that there should, in the interests of justice, be an end to litigation. It has also to be borne in mind that the attempt herein is not to amalgamate separate services. Here the service was and is one i.e,. an All India Service of Appraisers. Prior to the Rules 50% posts in the service were filled by direct recruitment and the seniority of the selectees was fixed by the U.P.S.C. in the order of selection. Inter se seniority amongst direct recruits was thus a sealed event. That was the foundation. Entry into service by promotion was fortuitous dependent on the exercise by the departmental committees in the respective Customs Houses and the outcome. Mervyn Coutinhos case tells the way to work it out. In their respective quotas direct recruits as well as promotees rotate the quota system as 1:1 as mentioned in Mervyn Coutinhos case. But after the Rules of 1961, when the quota system has been discarded Mervyn Coutinhos rule cannot apply. As per Rule 4-C of the 1961 rules, the allocation of at least 50% posts in favour of direct recruits is ensured at all times. The enlistment of the direct recruits, allocated to Customs Houses on the basis of their selection, would obviously present no difficulty. Equally enlistment of promotee Appraisers, since coming from feeder sources of Customs Houses, from the date of their promotion, would present no difficulty. Both would be entitled to placement in the joint seniority list on the basis of their continuous officiation.

17. We thus go to uphold the orders of the Tribunal to this extent that a fresh All India Combined List of Appraisers be prepared by the respondents on the basis of continuous officiation of the incumbent in the post of Appraiser appointed on and from the date of the Customs Appraisers Service, Class II Recruitment Rules 1961. But for appraisers appointed prior to that date the rule of Mervyn Coutinho would be the basis to work out the inter se seniority of the incumbents to operate the quota and rotational rule. (emphasis supplied)

4. Such 1961 Rules remained in force till such rules were superseded by Department of Revenue (Customs Appraiser) Recruitment Rules, 19

88, with effect from 1.5.1988. 1988 Recruitment Rules provide for recruitment of 50% through direct recruitment and 50% by promotion. However, the Rules do not contain any specific provision relating to fixation of seniority and there is nothing specifically contained in such rules that seniority has to be fixed by adopting the principle of quota as well as rotation.

5. At this stage, it is necessary to notice the various developments including decisions of the Central Administrative Tribunal, in short "the Tribunal". It appears that after introduction of 1988 Recruitment Rules, some of the promotees, namely, V.B. Yuvaraj, Mrs. Bertsie Sundaram, Mrs. Tamilmani Sriram, K. Ramesh and B. Ramesh Kumar, who are respectively opposite party Nos.3,4,5,6 & 7 in O.A.No.833 of 1999 (present W.P.No.15158 of 2002) filed O.A.No.39 of 1988 before the Madras Bench of the Tribunal. Similarly, P.S. Uma Mahesh, opposite party No.8 in O.A.No.833 of 1999, filed O.A.No.162 of 1988 and A. Madhusudana Rao and M.J. Babu Rao, opposite party Nos.9 & 10 in O.A.No.833 of 1999 against Union of India and other officials. The specific prayer was to the effect that Order No.B12014/4/87 Ad.II(A) should be quashed and the Union of India and other officials should be directed not to revert the applicants on the basis of new recruitment Rules for Customs Appraisers. The common contention in such Original Applications was to the effect that even though such applicants had been promoted on ad hoc basis they were in fact regular promotees because they were allowed to officiate in the higher post and the promotion had been made on the basis of the recommendation of the duly constituted recommendation committee, which had gone into qualification, seniority as well as merit of such applicants and such promotions were apparently made on the vacancies which were in existence prior to 1987 i.e., before coming into force of the new recruitment rules. The further contention was to the effect that new recruitment rules were only prospective and were effective from 1.1.1988. The stand of the department at that stage was that the applicants had not been promoted on regular basis under the old Rules, namely, 1961 Rules. It was specifically pointed out as per the said Rules at least 50% of the posts of Appraisers were to be filled up by direct recruitment and the balance could be filled up by promotion or other sources as there was a shortfall in the direct recruitment quota, the applicants had been promoted on ad hoc basis on the basis of seniority-cum-fitness and in the promotional order itself was it was specifically stated that promotion was on ad hoc basis, which would not confer right on such appointees, and such ad hoc promotion should not be equated with regular appointment and such ad hoc service would not count for seniority and such promotions were made in order to meet the urgent requirements of the administration and the instructions contained in the Department of Revenue Circular dated 16.10.1980 had been followed. It was indicated that they had not been promoted against any vacancy post existing prior to 1.1.1988 within the permissible limit for the promotees and they had been merely promoted on ad hoc basis.

6. After hearing both sides, Madras Bench of the Tribunal ultimately concluded :-
"... Accordingly we are clear in our view that the applicants had not been promoted on a regular basis against the promotion quota, in accordance with the 1961 recruitment rules. They have been merely holding posts as

Customs Appraisers in the quota meant for direct recruits, purely on ad hoc basis and that such promotions cannot be equated with regular promotions made under the 1961 recruitment rules. The promotion of the applicants would not confer on them any right to be regularly promoted as Customs Appraisers under the 1961 recruitment rules. Further, all ad hoc promotions are subject to periodical reviews. The first respondent is therefore within his rights to direct the other two respondents to conduct a review of the ad hoc promotions made earlier under the direct recruitment quota. Therefore the prayer of the applicants that the impugned order of the first respondent directing such a review should be set aside, cannot be granted nor can any direction be issued to the respondents not to revert the applicants. However, we make it clear that on the basis of a review which may be conducted by the respondents, if at all it comes to notice of the respondents that the applicants had in fact been functioning on ad hoc basis against posts not meant for direct recruitment quota, but meant as promotion quota, their cases will have to be considered as per the 1961 Recruitment rules, which were applicable to vacancies which existed up to 31.12.1987. In such an event the applicants are at liberty to approach this Tribunal if they are aggrieved by any order that may be passed after a review by the respondents.

7. Such order of the Tribunal was challenged before the Supreme Court and the following order was passed by the Supreme Court in Civil Appeal No.1194 of 1990 :-

 After hearing learned counsel for the parties, we find no good ground to interfere with the order of the Administrative Tribunal, specifically in view of the following observations:

However, we make it clear that on the basis of a review which may be conducted by the respondents, if at all it comes to notice of the respondents that the applicants had in fact been functioning on ad hoc basis against posts not meant for direct recruitment quota, but meant as promotion quota, their cases will have to be considered as per the 1961 Recruitment rules, which were applicable to vacancies which existed upto 31.12.1987.
(Emphasis supplied)

8. Subsequently, by Office Order No.470 of 1994, Smt. Bertsie Sundaram, Smt. Tamilmani Sriraman, Smt.S. Kousalya and P.S. Uma Mahesh were regularly promoted as Appraisers. It is relevant to extract the actual order of one such promotion :-

 The promotion of the following Officers who were promoted to the grade of Appraiser purely on ad hoc basis vide this Custom House Order Nos.147/86 dt.08.07.1986, 58/87, dt. 13.03.87 and 407/82 dt.28.12.92 are regularised in the scale of pay of Rs.2000-60-2300-eb-75-3200-10 0-3500. They are assigned date of promotion with effect from the date they assume charge as Appraisers (on regular basis).

9. Under paragraph 2 of the very same order, the petitioners 1 and 2 in W.P.No.26975 of 2005 and one Mathias Dung Dung were also promoted. (It may be emphasised that these three persons were promoted for the first time on regular basis, but in their case they were not promoted on ad hoc basis earlier). Similar orders relating to promotion on regular basis in respect of many other ad hoc Appraisers were issued by Order Nos.554 of 1995

and 284 of 1996. However, the orders being almost similar, it is not necessary to extract each such order in extenso.

10. Thereafter the Union of India purported to issue a seniority list of direct recruits and promotees appointed / promoted upto 31.12.1 987 vide letter dated 2.11.1997. In such letter, it was also indicated that All India Seniority list of Direct Recruit and Promotee Customs Appraiser appointed / promoted after coming into force of Customs Appraiser Recruitment Rule, 1988 with effect from 1.1.1988 will follow. In All India combined seniority/consideration list of Customs Appraiser relating to period prior to 31.12.1987, Serial Nos.1 to 72 were apparently the persons who had been appointed/promoted as Customs Appraisers prior to coming into force of Customs Appraiser Service, Class-II Recruitment Rule, 1961 and such seniority of those 72 Appraisers had been fixed on quota-rota basis as per Mervyn Coutinho□s case. Serial Nos.73 to 1043 purported to indicate seniority of promotees and direct recruits, apparently on the basis of the directions contained in the decision of the Supreme Court in Yadav□s case. At that stage, the name of Mrs. Bertsie Sundaram, Tamilmani Sriram, K. Ramesh, M.J. Babu Rao, A. Madhusudhana Rao and P.S. Uma Mahesh were included at Serial Nos.1015 to 1020 respectively indicating the date/deemed date of joining Customs Appraisers as 13/12.3.1987. It is obvious that such seniority list was on the basis of the date of ad hoc promotion rather than on the basis of the subsequent regular promotion.

11. The direct recruits who were appointed between the period 1987 and 1994 and were shown junior to such promotees, who were promoted on ad hoc basis in March, 1987 but made regular only after 1994 and 19 95 by fixing their seniority from the date of their ad hoc promotion filed representations to the effect that such ad hoc promotees should not be treated as senior to the direct recruits. However, when no specific order was passed and it was found that some of the promotees had been further promoted on ad hoc basis as Assistant Commissioners, the direct recruits filed O.A.No.833 of 1999 before the Madras Bench of the Tribunal. At that stage, a reply statement was filed on behalf of the official respondents. In such reply statement, the official respondents raised the question of limitation. The official respondents took the stand that between 1987 and 1994 at no point of time the requirement of direct recruit Appraisers had been met in full and vacancies always existed against direct recruit quota, which necessitated giving of promotion to the post of Appraisers. It was further indicated :-
9. ... The Supreme Court judgment did not give any direction to the effect that on joining of one Direct Recruit Appraiser, one of the Promotee Appraiser who is officiating on ad-hoc basis against a Direct Recruit vacancy should be reverted. The Supreme Court judgment is not to the effect that once a Direct Recruit is available for appointment, the Respondents 3 to 14 in the O.A.No.39 of 1988, 162 of 1988 and 168 of 1988 ought to have been reverted to the lower post. The very idea of effecting promotion against Direct Recruit vacancies is to make the working strength equivalent to the sanctioned strength. If there were vacancies inspite of Direct recruit joining, then going by the idea of filling all the vacancies had to continue for the reasons mentioned earlier. This has resulted in adjusting the adhoc promotees against the vacancies, allowing them to continue and not to revert them. This was

necessitated out of public interest and not to favour the promotees. Further at no point of time any Direct Recruit Appraiser was turned away for want to Direct Recruit vacancy.

12. At that stage, the official respondents took the stand that seniority given to the promotees from the date of initial ad hoc promotion was correct in the light of the subsequent decision of the Supreme Court in Gaya Baksh Yadav's case as such seniority had been counted from the date of continuous officiation.

13. The Madras Bench of the Tribunal by its judgment dated 17.10.20 00, dismissed O.A.No.833 of 1998 filed by the direct recruits. The first conclusion of the Tribunal is to the effect that the Original Application filed by the direct recruits was barred by limitation. The Tribunal also rejected the contention of the direct recruits by relying upon the decision of the Supreme Court in Gaya Baksh Yadav's case. Such decision of the Tribunal is the subject matter of challenge in W.P.No.15158 of 2002, which had been filed by the direct recruits.

14. While the dispute relating to seniority of the direct recruits vis-a-vis the promotees in the Custom House of Madras was thus pending before the Madras Bench of the Tribunal or the High Court at Madras, similar dispute was raised by the direct recruits posted in Bombay Custom House before the Bombay Bench of the Tribunal in O.A.No.855 of 1998. Such application was filed by All India Customs Officers (Direct Recruit Appraisers) Association along with two other direct recruits. Apart from the Union of India and the Chairman, Central Board of Excise and Customs, All India Customs Appraising Officers' Federation, purportedly representing the promotees, was impleaded as Respondent No.3. The Bombay Bench of the Tribunal referred to the observation of the Supreme Court in Gaya Baksh Yadav's case to the effect that allocation of at least 50% posts in favour of the direct recruits must be ensured at all times and direct recruits and promotee Appraisers will be
entitled to placement in the joint seniority list on the basis of their continuous officiation and observed :-
4. Applicants' case is that Direct Recruits for all times, entitled to 50% of the post of Appraisers. After the promulgation of 1961 Recruitment Rules, which were in force on 31.12.1987, every year the intake of promotee Appraisers has been far in excess of their entitlement of 50%. As such, promotion of persons which were made beyond 50% has to be reckoned as promotions contrary to the Recruitment Rules and general principles of Seniority, 1959.

15. The Bombay Bench of Central Administrative Tribunal also referred to the decision of the Supreme Court in the case of All India Federation of Central Excise V. Union of India [(1997 SCC (L & S) 159] and ultimately held that the promotees cannot take advantage of any promotion beyond the percentage applicable to them as per 1961 Rules and such promotion beyond the prescribed limit should be considered as promotion de hors the Rules. It was further concluded that the persons promoted on ad hoc basis cannot claim the benefit of seniority. Ultimately, the seniority list dated

12.11.1997 was quashed and the official respondents were directed to review positions of those who had been promoted beyond 50% of their quota on ad hoc basis which is violative of the terms of Rule 4(c) of 1961 Recruitment Rules and General Principles of Seniority, 1959. It is not in dispute that a writ petition has been filed against the aforesaid decision and is pending before the Bombay High Court.

16. In purported exercise of the directions so issued by the Bombay Bench of the Tribunal, the Union Government and the official respondents have issued another draft list of seniority, wherein the position of some of the ad hoc promotees has been pushed down and some of the direct recruits have been shown as senior. The official respondents have purported to follow the principle of seniority on the basis of rotation. On the issuance of such draft seniority list, apprehending that further promotion to the next promotional post from the Appraiser would take place on the basis of such draft seniority list, two of the ad hoc promotees who have been regularised subsequently have filed O.A.Nos.408 and 419 and of 2005 and the one promoted for the first time on regular basis has filed O.A.No.566 of 2005 before the Madras Bench of the Tribunal.
17. The main prayer in such Original Applications is to the effect that no promotion should be effected on the basis of the draft seniority list and promotion, if any, should be done on the basis of seniority list dated 12.11.1997.

18. Such Original Applications have been disposed of by common order dated 9.8.2005 by the Madras Bench of the Tribunal by observing that the Madras Bench of the Tribunal is bound by the decision of the Bombay Bench of the Tribunal and since the matter was pending in the Bombay High Court, the promotees have to pursue their remedy either in the Bombay High Court or await for the final outcome of the litigation. The three writ petitions, namely, W.P.Nos.39564, 39583 and 26975 of 2005 are filed by the promotees against such order of the Tribunal.

19. In the above backdrop, stage is now set to advert to the thorny issue. The main contention raised by the promotees is to the effect that in view of the decision of the Supreme Court in Gaya Baksh Yadav□s case, seniority had been rightly counted from the date of continuous officiation and the seniority list thus finalised in November, 19 97 was correct and, therefore, there was no occasion to issue a further draft seniority list. It is further contended that at any rate no promotion should be effected on the basis of the draft seniority list by ignoring the earlier seniority list, which was final.

20. The stand of the direct recruits is to the effect that those promotees, who had been promoted on ad hoc basis prior to 31.12.1987 or even after 1.1.1988, in excess of 50% available to the promotees must be considered as purely ad hoc promotees and cannot claim any seniority on their

subsequent regularisation from the date of initial ad hoc promotion and their seniority should be counted only from the date when they were regularly promoted within 50% available to them.

21. So far as the official respondents are concerned, there has been a discernible shift in their stand like shifting sand. The contention of the Union Government and the official respondents at present is to the effect that the promotees had no right to get any promotion beyond the maximum of 50%, as envisaged under Rule 4(c) of 1961 Rules, and giving them ad hoc promotion did not clothe them with any right to claim seniority from the date of their ad hoc promotion. It is their further stand that seniority has to be now fixed after 1.1.1988 by following quota as well as rotation rule and accordingly the draft seniority list has been prepared.

22. In the three writ petitions, namely, W.P.Nos.39564, 39583 and 2 6975 of 2005, filed by the promotees, the specific stand of the official Respondents is to the effect that ad hoc seniority list has not been finalised, but since many promotional posts are available, steps are being taken to fill up the promotional post in the rank of Assistant Commissioner on ad hoc basis, subject to finalisation of seniority list and subject to various litigations pending before different courts and if the position relating to seniority would subsequently change, obviously, there would be a review of the situation even relating to the question of promotion.

23. Learned counsels appearing for the promotees have pointed out that in view of the specific stand taken by the Union Government during earlier litigations before Madras Bench and even before Bombay Bench of the Tribunal, the Union Government should not be permitted to take a different stand at this stage. However, we are not inclined to consider the above submission as even assuming that the Union of India should not be permitted to take a different stand, it is obvious that the direct recruits are not bound by any stand taken by the Union of India at different times and, therefore, the matter has to be decided on the basis of interpretation of the Rules and the relevant decisions.

24. The O.A.No.833 of 1996 filed by the direct recruits has been rejected on two counts. Firstly, on the ground of limitation and, secondly, on merit. So far as the question of limitation is concerned, the Tribunal has observed that the draft seniority list had been circulated and some of the applicants knew of such draft seniority list and even after finalisation of the seniority list, the Original Application was not filed within the prescribed period of limitation and, therefore, such application is barred by limitation.

25. In Section 21 of the Administrative Tribunals Act, 1985 the period of limitation is prescribed, but simultaneously power has been conferred on the Tribunal to condone delay, if any. In the present case, even assuming that the application was barred by limitation, it can be said without fear of any contradiction that in the peculiar facts and circumstances of the case, delay, if any, was required to be condoned. Apart from the fact that some representations had been made, the question raised was of seminal importance not only to the Appraisers of Custom House of Madras, but also throughout India and, therefore, it was required of the Tribunal to gloss over the question of limitation if any. Apart from the above, the question of limitation has no significant bearing as the matter has now come to High Court

not only from the very same litigation but also from other litigations involving similar question. Moreover, as rightly pointed out by the learned counsels for the direct recruits as well as the Union Government, the Bombay Bench of the Tribunal has quashed the seniority list on all India basis and such decision is not confined merely to Bombay Custom House and the Union of India has been directed to reconsider the question of seniority and, therefore, the technical bar raised by the Madras Bench of the Tribunal has no significance. To be fair to the learned counsels appearing for the promotees, it must be said that such learned counsels have stated that the question of limitation, has no significance because of the subsequent events including the setting aside of the seniority list by the Bombay Bench of the Tribunal and they have rightly submitted that the matter has to be decided on its own merit by the High Court.

26. The first contention raised in the three writ petitions, namely, W.P.Nos.26975, 39564 and 39583 of 2005, is the propriety of the action of the Government in issuing a further draft seniority list when a seniority list had already been prepared and finalised in 1997 and moreover in contemplating promotion to the next higher post on the basis of such draft seniority list without finalising the question of seniority.

27. This question raised by the learned counsels appearing for the promotees can be met with a short answer. In view of the decision of the Bombay Bench of the Tribunal it cannot be said that □final seniority list□ circulated in the year 1997 is any longer final. As rightly pointed out by the learned counsel appearing for Union of India, in the absence of any stay by the Bombay High Court, the Union Government has sought to implement the directions without prejudice to the contentions raised in the writ petition. It is also made clear in the counter affidavit that the Union of India is contemplating to give promotion only on ad hoc basis without prejudice to the claim of any of the Appraiser to be ultimately decided after finalisation of the seniority list at the end of the myriad of litigations.

28. Learned Additional Solicitor General has submitted that even in the absence of finalisation of formal seniority list the Government is not precluded from acting upon the provisions contained in the draft rule or on the basis of the draft seniority list in exigencies of service. In our opinion, the stand taken by the Union of India cannot be found fault with. The decision of the Bombay Bench of the Tribunal has obviously opened the door for re-drawing the seniority list and the Central Government has taken steps in that regard by circulating a draft seniority list. Since the seniority list of 1997 can no longer be said to be the final list, it is open to the Union of India to consider the question of promotion purely on ad hoc basis including the draft seniority list without conferring any substantive right on such ad hoc promotee.

29. The main question, of course, relates to the principle on which seniority is to be fixed. In view of the decision of the Supreme Court in Coutinho□s case (AIR 1967 SC 52), obviously there is no dispute relating to seniority of the Appraisers (either direct recruits or promotees) who had been recruited on the basis of the instructions which were applicable before

introduction of 1961 Rules. There is no dispute that after introduction of 1961 Rules, the question of seniority has to be fixed in accordance with such rules which were interpreted by the Supreme Court in Yadav's case. Even though Yadav's case purported to bring all disputes to an end, unfortunately the litigations have not come to an end. As per the learned counsels for the promotees, in view of the specific observation of the Supreme Court as contained in paragraph 16 and the direction contained in paragraph 17 of such decision, seniority has to be reckoned from the date of continuous officiation of the promotees and on that basis the promotees had been rightly shown as seniors in the seniority list, which was finalised on 12.11.1997.

30. Learned counsels appearing for the direct recruits (and even the learned counsels appearing for the Union of India by adopting "an improved and new model" stand) different stand have contended that paragraph 16 of such decision makes it very clear that at least 50% of the vacancies are ensured at all times in favour of the direct recruits and, therefore, such observation of the Supreme Court obviously means to the extent any promotee had been promoted by exceeding the balance 50% available to other appointees including the promotees, is thus an encroachment on the allocation of at least 50% posts for the direct recruits and any such promotee who has been promoted in excess of 50% would obviously be considered as an ad hoc promotee in fortuitous circumstance and such promotee cannot claim any advantage of seniority from the date of such ad hoc appointment on his subsequent regularisation. In this context, it is also further submitted by the learned counsels appearing for the direct recruits as well as Union of India that in a long line of decisions it has been held that the persons being promoted on ad hoc basis cannot claim any right of seniority unless the rules so envisage specifically. In this context, it is also pointed out that in the orders relating to promotion of various claimants now before the Court, it had been specifically indicated that promotion was purely on ad hoc basis which would not give them any right of regular promotion and subsequently at the time of regular promotion also it was so indicated that their service shall be regularly counted from the date when they assumed charge. It is therefore contended that in view of the specific terms of the appointment, in view of the settled principle of law and in view of the fact that direct recruits are ensured allocation of 50% of posts at all times, the contention raised by the promotees cannot be accepted.

31. Learned counsels for both sides have placed strong reliance upon the decision of the Supreme Court reported in 1990(2) SCC 715 (DIRECT RECRUIT CLASS II ENGINEERING OFFICERS" ASSOCIATION v. STATE OF MAHARASHTRA AND OTHERS), which is also apparently the basis of the decision in Yadav's case, and it is therefore necessary to extract in extenso from the said decision, where the Constitution Bench summarised its conclusions as follows :-

47. To sum up, we hold that :

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according

to the date of his confirmation.
The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.
(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.
(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.
(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the interference is irresistible that the quota rule had broken down.
(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.
(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.
(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.
(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.
(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.
(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position.

With respect to Writ Petition No.1327 of 1982, we further hold:

(K) That a dispute raised by an application under Article 32 of the Constitution must be held to be barred by principles of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by a j ent which became final.

In view of the above and the other findings recorded earlier, we do not find any merit in any of the civil appeals, writ petitions and special leave petitions which are accordingly dismissed.

32. The learned counsels appearing for the promotees have submitted that in view of ratio of the aforesaid decision as reflected in 47(

B), the seniority of the promotees should be counted from the date of adhoc promotion, whereas according to the counsels for the Direct Recruits and the Union of India, para 47(A) is applicable. In order to resolve the controversy, it is necessary to consider some of the decisions touching upon the question rendered before and after the decision in Direct Recruit□s case. It is significant to observe that in all the cases the ratio of the Direct Recruit□s case has been clarified and followed.

33. In (1976) 2 SCC 901 (V.B. BADAMI AND OTHERS v. STATE OF MYSORE AND OTHERS), it was observed that where appointment was made in excess of quota, such temporary promotion would not give any benefit in the matter of seniority.

34. In (1977) 1 SCC 308 (N.K. CHAUHAN AND OTHERS v. STATE OF GUJARAT AND OTHERS), the question of seniority was in dispute between direct recruits and the promotees to the post of Deputy Collectors in the State of Gujarat. It was observed inter alia :-
□40. This brief and quick survey of decided cases and the submissions, considered by us in the judicial crucible, yield the following conclusions, leaving aside the question of □confirmation□ in service which, in the Gujarat set-up, leaves our controversy untouched;
(a) The quota system does not necessitate the adoption of the rotational rule in practical application. Many ways of working out □quota□ prescription can be devised of which rota is certainly one.
...
(e) Promotees who have been fitted into vacancies beyond their quota during the period B the year being regarded as the unit □ must suffer survival as invalid appointees acquiring new life when vacancies in their quota fall to be filled up. To that extent they will step down, rather be pushed down as against direct recruits who were later but regularly appointed within their quota. (Emphasis supplied)

35. In (1992) Supp(1) SCC 272(KESHAV CHANDRA JOSHI AND OTHERS v. UNION OF INDIA AND OTHERS), Justice K. Ramaswamy, speaking for the Bench, after referring to the propositions A and B in paragraph 47 of Direct Recruits case, observed :-
□26. As stated, the counsel for the promotees placed strong reliance on proposition while the counsel for the Direct Recruits relied on proposition . The controversy is as to which of the propositions would apply to the facts of this case. The proposition □A□ lays down that once an incumbent is appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The latter part thereof amplifies that where the initial appointment is only ad hoc and not according to rules and is made as a stop gap arrangement, the period of officiation in such post cannot be taken into account for reckoning seniority. The quintessence of the propositions is that the appointment to a post must be according to rules and not by way of ad hoc or stop gap arrangement made due to administrative exigencies. If the initial appointment thus made was de hors the rules, the entire length of such service cannot be counted for seniority. In other words the appointee would become a member of the service in the substantive capacity from the date of his appointment only

if the appointment was made according to rules and seniority would be counted only from that date. Propositions □A□ and □B□ cover different aspects of one situation. One must discern the difference critically. Proposition must, therefore, be read along with para 13 of the judgment wherein the ratio decidendi of Narender Chadha was held to have considerable force. The latter postulated that if the initial appointment to a substantive post or vacancy was made deliberately, in disregard of the rule and allowed the incumbent to continue on the post for well over 15 to 20 years without reversion and till the date of regularisation of the service in accordance with the rules, the period of officiating service has to be counted towards seniority. This Court in Narender Chadha case was cognizant of the fact that the rules empower the government to relax the rule of appointment. Without reading paragraph 13 and Proposition and Narender Chadha ratio together the true import of the proposition would not be appreciated. We would deal with the exercise of power of relaxing the rule later. After giving anxious consideration, we are of the view that the latter half of Proposition □A□ would apply to the facts of the case and the rule laid down in that half is to be followed. If the concerned rules provide the procedure to fix inter se seniority between direct recruits and promotees, the seniority has to be determined in that manner.
...

34. Accordingly we have no hesitation to hold that the promotees have admittedly been appointed on ad hoc basis as a stop gap arrangement, though in substantive posts, and till the regular recruits are appointed in accordance with the rules. Their appointments are de hors the rules and until they are appointed by the Governor according to rules, they do not become the members of the service in a substantive capacity. Continuous length of ad hoc service from the date of initial appointment cannot be counted towards seniority. ... (Emphasis supplied)

36. In (1993) 3 SCC 371 (STATE OF WEST BENGAL v. AGHORE NATH DEY), it was observed :-
21. We shall now deal with the conclusions (A) and (B) of the Constitution Bench in the Maharashtra Engineers case quoted above.

22. there can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (a) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed □according to rules□. The corollary set out in conclusion (A), then is, that □where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such posts cannot be taken into account for considering the seniority□. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stopgap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.

23. This being the obvious inference from conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will be counted for seniority. We have no doubt that conclusion (B) cannot include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.

24. The question, therefore, is of the category which would be covered by conclusion (B) excluding therefrom the cases covered by the corollary in conclusion (A).

25. In our opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, "if the initial appointment is not made by following the procedure laid down by the rules" and the latter expression " till the regularisation of his service in accordance with the rules". We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stopgap arrangement and not according to rules. It is, therefore, not correct to say that the present cases can fall within the ambit of conclusion (B), even though they are squarely covered by the corollary in conclusion (A)." (Emphasis supplied)

37. In (1995) Supp.(2) SCC 407 (STATE OF MAHARASHTA AND ANOTHER A. W. DHOPE AND OTHERS v. SANJAY THAKRE AND OTHERS), it was observed :-

6. Insofar as in the second aspect of the case is concerned, Shri Bhandare, appearing for the State, is at pains to urge that in view of what was held by a three-Judge Bench of this Court in State of W.P. v. Aghore

Nath Dey the present was pre-eminently a fit case where the service rendered by the promotees, even though ad hoc, was required to be counted for the purpose of seniority. We have two observations to make regarding this submission. The first is that Aghore Nath was not a case of claim by the promotees for seniority over direct recruits; as was in the cases of Janardhana and Narender Chadha, ratio of which cases was not applied in Aghore Nath case for the reason that the cases did not deal with inter se seniority between direct recruits and promotees. So the ratio of Aghore Nath case cannot apply to the facts of the present case as here we are concerned with inter se seniority. This apart, a perusal of Aghore Nath decision shows that benefit of ad hoc service would not be admissible if appointment be in violation of rules. Now, if the quota rule had not broken down as held by the Tribunal which view we have affirmed, the appointment of promotes has to be regarded as in violation of rules.

...

8. For the aforesaid reason, what was stated by the Constitution Bench in Direct Recruit Class II Engineering Officers Assn. case would not also apply because to get benefit of what was stated in subpara (B) of para 44 [(1990)2 SCC p.745, para 47(B)], which is strongly pressed into service by Shri Dholakia, the appointment has to be as per the rules, which was not so in the present case so far as the promotees are concerned.

38. In (1996) 7 SCC 759 (V.P. SHRIVASTAVA AND OTHERS v. STATE OF M.P. AND OTHERS), after referring to Direct Recruits case in para 9, the Supreme Court observed:-

10. We are not concerned with the other propositions laid down by this Court in the present case. In the case in hand the initial appointment of the respondents on promotion not having been made following the procedure laid down by the Recruitment Rules of 1965 and even though they are continuing in the post uninterruptedly but the Public Service Commission having not approved their appointments as yet, proposition B above will have no application. Consequently, applying proposition A above, the appellants-direct recruits must be held senior to the respondents private respondents ad hoc promotees. The Tribunal obviously erred in law in not following the aforesaid authoritative pronouncement of this Court for determination of the inter se seniority between direct recruits and the promotees.

11. In the three-Judge Bench decision of this Court in the case of State of W.B. v. Aghore Nath Dey, this Court held: (SCC p.382, para 22)

... that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed according to rules. The corollary set out in conclusion (A), then is, that where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such posts cannot be taken into account for considering the seniority.

12. It was thus held that conclusions A and B of the Constitution Bench in Direct Recruits case have to be read harmoniously and conclusion B cannot cover cases which are expressly excluded by conclusion A.

13. In a more recent case of V. Sreenivasa Reddy v. Govt. of A.P., where one of us (brother Ramaswamy, J.) was a member, all the decisions of this Court on the point have been considered and it has been laid down that temporary or ad hoc appointments are not appointments in accordance with the rules and the temporary service cannot be counted towards the seniority.

39. In (1998) 5 SCC 293 (Dr. ANURADHA BODI AND OTHERS v. MUNICIPAL CORPORATION OF DELHI AND OTHERS), while considering the question of seniority of ad hoc appointees, the Direct Recruit's case and Aghore Nath Dey's case were referred to and it was observed that Paragraph (A) sub para would be applicable. It was further observed:

12. If the facts of these two cases are analysed in the light of the aforesaid decisions, there can be no doubt whatever that the petitioners fall within the corollary in Conclusion (A). The orders of appointment issued to the petitioners are very specific in their terms. Though the recruitment rules came into force on 6-8-1982, the appointments were not made in accordance therewith. They were ad hoc and made as a stopgap arrangement. The orders themselves indicated that for the purpose of regular appointment the petitioners were bound to pass the UPSC examination in the normal course in the direct competition. Hence the petitioners will not fall under the main part of Conclusion (A) or Conclusion (B) as contended by the learned counsel for the petitioners.

40. In (2000) 7 SCC 561 (SURAJ PARKASH GUPTA AND OTHERS v. STATE OF JAMMU AND KASHMIR AND OTHERS), the Supreme Court distinguished (1985) 2 SCC 604 (G.S. LAMBA v. UNION OF INDIA AND OTHERS) and (1986) 2 SCC 157 (NARENDER CHADHA v. UNION OF INDIA AND OTHERS) (latter case had been noticed in Direct Recruit's case (1990) 2 SCC 715) by observing that recent trend of cases in this Court is entirely different.
28. The decisions of this Court have recently been requiring strict conformity with the Recruitment Rules for both direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental rules of recruitment. In Keshav Chandra Joshi v. Union of India the Rule permitted relaxation of the conditions of service and it was held by the three-Judge Bench that the Rule did not permit relaxation of Recruitment Rules. The words "may consult PSC" were, it was observed, to be read as "shall consult PSC" and the Rule was treated as mandatory. In Syed Khalid Rizvi v. Union of India (1993 Supp(3)SCC 575 at p.603) decided by a three-Judge Bench, a similar strict principle was laid down. The relevant Rule Rule 3 of the Residuary Rules (see p.603, para 33) in that case did permit relaxation of the "Rules". Even so, this Court refused to imply relaxation of Recruitment Rule and observed : (SCC pp.603-04, para 33)

The condition precedent, therefore, is that there should be an appointment to the service in accordance with rules and by operation of the rule, undue hardship has been caused, ... It is already held that conditions of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to rules. The former cannot be relaxed. (emphasis added)
29. Similarly, in State of Orissa v. Sukanti Mohapatra it was held

that though the power of relaxation stated in the rule was in regard to "any of the provisions of the rules", this did not permit relaxation of the rule of direct recruitment without consulting the Commission and the entire ad hoc service of a direct recruit could not be treated as regular service. Similarly, in M.A. Haque (Dr) v. Union of India it was held that for direct recruitment, the rules relating to recruitment through the Public Service Commission could not be relaxed. In J&K Pubic Service Commission v. Dr. Narinder Mohan it was held that the provisions of the J&K Medical Recruitment Rules could not be relaxed for direct recruitment. The backdoor direct recruitments, could not be permitted. (See also Arundhati Ajit Pargaonkar (Dr) v. State of Maharashtra). In Surinder Singh Jamwal (Dr) v. State of J&K this Court directed the direct recruits to go before the Public Service Commission.

40.1 After concluding that quota rule had not broken down, regarding applicability on the basis of rotation, it was observed :-

40. We shall next refer to the contention for the direct recruits that "rota quota" rule is to be applied. Before us, it is not disputed by the learned counsel for the direct recruits that in the Recruitment Rules, 1978, there is only a quota rule and that no rota rule has been expressly prescribed.

Question is whether "rota" can be implied

41. The direct recruits contend that rota is to be implied or read into the "quota" rule. It is also argued that there has been a previous practice of applying a rota and that this fact stands conceded in the counter-affidavit filed by the Government in SWP No.824-B of 1994 . Reliance is also placed on the Cabinet note of December 1997 where the view of the Law Department that quota-rota rule is to be applied, is referred to.

42. In our opinion, in view of the admission before us by all parties that there is no express rota rule, the decision of the High Court that "rota" principle applied cannot be upheld. As held in N.K. Chauhan v. State of Gujarat by Krishna Iyer, J. there is no question of a quota being necessarily "interlocked" with rota. It is not necessarily inscribed within every quota rule. Again in B.S. Yadav v. State of Haryana Chandrachud, C.J. held that a "quota" does not imply a rota. The first part of the contention of the direct recruits is without any substance.

Rota cannot be brought in only because of past practice

43. So far as the second part of the contention that there has been previous practice, we may refer to L. Chandrakishore Singh v. State of Manipur ((1999) 8 SCC 287 at p.302 : JT at p.593). There it was held that a practice must be consistent with rules and that a practice not consistent with rules is not acceptable. In that case, the practice of not considering for promotion probationers and considering only confirmed candidates was held not consistent with the Rules and could not be permitted. Similarly, in D. Stephen Joseph v. Union of India it was held that a past practice which was de hors a rule could be of no help. The question in that case was as to whether the requirement of particular years of service with graduation for

promotion meant service after graduation or service during which a degree qualification was acquired. A practice of counting three years after obtaining qualification was not accepted. In that view of the matter, the second part of this contention also goes.

44. Hence, it must be held that there is no rota coupled with quota but that there is only a quota rule. Point 2 is decided accordingly.

40.2 In para 72, (1988) Supp. SCC 225 (K. SIVA REDDY v. STATE OF ANDHRA PRADESH AND OTHERS) was distinguished as the service rendered on ad hoc basis was against the quota and the post was within the direct recruit quota. It was observed :

77. We shall next refer to another set of cases relied upon by the direct recruits where, on facts, the promotees were not given the benefit of ad hoc/stopgap service. Here the service rendered by the promotees was either outside quota or the candidates were not eligible by the date the order of regularisation was passed or were not having the required experience. C.K. Antony v. B. Muraleedharan arising from Kerala State has some special features. There was a rule similar to Rule 23 of the J&K Rules and Rule 23(a) of the Andhra Pradesh Rules. The said Rule permitted retrospective regularisation of the promotees from anterior dates but this Rule stated that the said regularisation should be "without prejudice to seniority". It was no doubt interpreted that the Rule meant that the seniority of direct recruits could not be affected. The question as to when it could be said that the seniority of a direct recruit would be prejudiced, was not elaborated. Whether the case of direct recruits would be prejudiced even if the promotees were given seniority from an anterior date upon a post within their quota, was not decided. Further, on facts, the earlier ad hoc promotion of the promotees was not against cadre posts but was in excess of the quota. Obviously, it could not count for seniority in view of Direct Recruit case. Any regularisation of such service in a direct recruitment post would definitely prejudice the seniority of direct recruits. In view of the above peculiar features, the case is clearly distinguishable.

...

79. Summarising the position, we therefore hold that the ad hoc/ stopgap service of the promotees cannot be treated as non est merely because PSC was not consulted in respect of continuance of the ad hoc/ stopgap service beyond six months. Such service is capable of being regularised under Rule 23 of the J&K (CCA) Rules, 1956 and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors. There is no "rota" rule applicable. The "quota" rule has not broken down. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies within their quota, after due regularisation. Such service outside the promotee quota cannot count for seniority. Service of the promotees which is regularised with retrospective effect from the date of vacancies within the quota counts for seniority. However, any part of such ad hoc/stopgap or even regular service rendered while occupying the direct recruitment quota cannot be counted. Seniority of the promotees or transferees is to be fixed as per quota and from the date of commencement of probation/regular appointment as stated above. Seniority of direct recruits is from the date of substantive

appointment. Seniority has to be worked out between direct recruits and promotees for each year. We decide Point 3 accordingly.
(Emphasis added)

40.3 In paragraphs 80 and 81, it was observed that direct recruits cannot claim appointment from the date of vacancy within quota before their selection. It was further observed :
... in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not borne in service. This principle is well settled.
(For the aforesaid purpose, reliance was placed upon (1977) 1 SCC 30 8 (cited above), (1983) 3 SCC 601(Janardhana V. Union of India), (198 7) Suppl. SCC 763 (A.N. Pathak v. Secretary to the Government).

42. In (2003) 4 SCC 65 (A.G. SAINATH REDDY v. GOVERNMENT OF ANDHRA PRADESH AND OTHERS), the Department had considered the question of seniority for the promotee from the date of ad hoc promotion, which was challenged by the direct recruits before the Tribunal which allowed such application. In appeal, the Supreme Court upheld such decision of the Tribunal by following the ratio of Aghore Nath Dey's case.

43. In (2004) 6 SCC 729 (M. SUBBA REDDY AND ANOTHER v. A.P. STATE ROAD TRANSPORT CORPORATION AND OTHERS) by distinguishing the Direct Recruit's case and by following the subsequent decision in (1993) 3 SCC 371 (STATE OF WEST BENGAL v. AGHORE NATH DEY), the majority observed :-

8. The appellants have relied upon the judgment of this Court in Direct Recruit Class II Engg. Officers' Assn. Case. In that matter, an unusual situation had developed under which the rota-and-quota system had broken down. The promotees had worked for twenty years without being reverted and in view of that fact, the Constitution Bench of this Court confirmed the principles of counting towards seniority, the period of continuous officiation. The said judgment has no application to the facts of this case. In the present case, the argument of the appellants is that on the date when the appellants were regularised, there were no direct recruits available and consequently they cannot be pushed down in the integrated seniority list. Hence, the judgment of this Court in the case of Direct Recruit Class II Engg. Officers' Assn. has no application to the present case. In fact, in the later judgment of this Court in the case of State of W.B. v. Aghore Nath Dey it has been held, relying on the judgment in the case of Direct Recruit Class II Engg. Officers' Assn. that seniority has to be counted from the date of initial appointment and not from the date of confirmation provided the initial appointment is according to the rules. But the corollary to the above proposition is that where initial appointment is only ad hoc and not according to the rules, the officiation cannot be taken into account for considering the seniority. The ratio of the judgment of this Court in the case of Aghore Nath Dey is that the benefit of ad hoc or temporary service is not admissible, if appointment was outside the rules. Applying the ratio of the said judgment to the facts of this case,the benefit of temporary promotion to the appellants under Regulation 30 was not admissible to them for computation of seniority.

9. It was, however, urged on behalf of the appellants that the position changed when vacancies became available in the promotion quota and the appellants came to be regularised vide order dated 9-9-1988. By the said order, according to the appellants, regularisation took place with retrospective effect from the dates indicated against their names and against the post earmarked for promotion and consequently in the integrated seniority list, they were not liable to be pushed down below direct recruits. We do not find any merit in this argument. Under Regulation 30 read with Regulation 34, temporary promotees were liable to be reverted as and when approved direct recruits became available. The promotees were liable to be replaced by direct recruits. Under Regulation 34, the said revertees were to be considered for repromotion only against the quota of vacancies reserved for promotees. This is clear from the terms of the order dated 9-9-1988. In the case of U.P. Secretariat U.D.A. Assn. v. State of U.P. it has been held that a direct recruit is to be treated as in service from the date he joins it, whereas the promotee has to be fitted into service from the date when he becomes entitled to fitment in accordance with the quota-and-rota rule prescribed under the rules. In the case of A.N. Sehgal v. Raje Ram Sheoran one of the arguments advanced on behalf of the promotees was that they were promoted as Executive Engineers against regular vacancies and they continued in service without break from the respective dates of their promotion, therefore, they were members of the service in substantive capacity from respective dates of promotion. It was argued that the direct recruit Shri Raje Ram was recruited long after the promotion of the appellants (promotees) and, therefore, the promotees cannot be pushed down and placed below the direct recruit. On examination of the rules, this Court found that recruitment to the service was from three sources, namely, direct recruitment, promotion and by transfer. A ratio was prescribed under Rule 5(2) between the promotees and direct recruits. The ratio was 1:1. It was held that Rule 5(2) had restricted the number of posts to promotees at 50%. Under the proviso to Rule 5(2), it was laid down that the rigour of 50% quota maybe relaxed in cases where direct recruits were not available. On reading Rule 5, it was held by this Court that a promotee within his quota under Rule 5 got his seniority from the date when the vacancy arose in his quota. It was held that the promotee occupying the post within 50% quota of the direct recruit acquired no right to the post and should yield to the direct recruit though promoted later than him. It was held that the seniority of the promotee has to be reckoned only from the date of availability of the post and, therefore, he has to be placed below his immediate senior promotee within the said quota. The officiating period of the promotee between the date of initial promotion and the date of availability of vacancy would stand excluded. A direct recruit on promotion within his quota, though later to the promotee is interposed in between the periods and interjects the promotee□s seniority; he snaps the links in the chain of continuity and steals a march over the promotee. It has been further held that the rule of quota is a statutory rule and must be strictly implemented. The result of pushing down the promotees may work hardship but it is unavoidable as it would otherwise nullify the statutory rules. In the case of U.P. Secretariat U.D.A. Assn. it has been held by this Court that mere inaction on the part of the Government cannot be made a ground to contend that the quota rule has broken down. In the present case, in the absence of direct recruitment, the appellants could not have got seniority over direct

recruits. Where there is inaction on the part of the Government or employer or imposed ban on direct recruitment in filling up the posts meant for direct recruits, it cannot be held that the quota has broken down.
(Emphasis supplied)

44. In (2000) 4 SCC 20 (T. VIJAYAN AND OTHERS v. DIVISIONAL RAILWAY MANAGER AND OTHERS), the persons who had been promoted on ad hoc basis and subsequently regularised were given seniority from the date of initial ad hoc promotion by referring to Direct Recruit's case as well as Aghore Nath Dey's case and by following (1999) 1 SCC 280 (Keshav Deo v. State of U.P.) and (1999) 9 SCC 596 (Ajit Kumar Rath v. State of Orissa). However, in the above case there was no promotion encroaching upon the quota of other category and this decision is therefore distinguishable.

45. In (2003) 5 SCC 511 (SANTOSH KUMAR v. STATE OF ANDHRA PRADESH AND OTHERS), the subsequent regularisation of a temporary promotee with retrospective effect was found justified by applying the ratio of the Direct Recruit case. However, in the said case, it was found that promotion given was within the promotion quota and, therefore, it was observed that direct recruit, who was recruited later on, could not challenge. This decision is distinguishable.

46. From the aforesaid decisions, it is apparent that where the appointment is in excess of the quota, the appointees in excess of such quota would obviously be held to be recruits de hors to the rules and as such, would not have any right to claim seniority (more particularly when such promotion is explicitly on ad hoc basis).

47. It cannot be construed that the Supreme Court in Gaya Baksh Yadav case intended to depart from the well settled principles relating to fixation of seniority and it cannot be understood that it was laid down even if the promotion is purely ad hoc and not within the quota for all classes, yet such seniority should be counted from the date of ad hoc promotion. As a matter of fact, the Supreme Court has pointedly referred to the principles enumerated in Direct Recruits case. The Direct Recruits case has been consistently interpreted subsequently to mean that where there is an ad hoc promotion coming within para 47(A), para 47(B) of such decision would not be applicable. There are several decisions of the Supreme Court wherein it was observed that when a quota has been fixed by the Rules, any promotion made contrary to the quota rule should be taken to be ad hoc or fortuitous giving no right to such person to claim seniority from the date of ad hoc promotion. This applies with more vigour to a case where promotion order itself specifically says that promotion is purely ad hoc and does not give any right to claim promotion on substantive basis as in the present case.

48. Of course, when the court comes to the conclusion that quota rule has broken down, obviously the appointment made in excess of the quota can be counted. However, it is evident that before coming to the conclusion that quota has broken down, the Court has to arrive at a definite conclusion that consistently for a considerable length of time, the appropriate authority had consciously departed from the quota.

49. In the present case, it cannot be said that the quota had broken down. On the other hand, the Supreme Court in Gaya Baksh Yadav's case categoricaklly observed that at least 50% is preserved for the direct recruits at all times. So far as ad hoc promotion before December, 1987 is concerned, to the extent that such appointment had been made within the maximum 50% available for the promotees, the observation of the Supreme Court in Gaya Baksh Yadav's case i.e., seniority should be counted from the date of continuous officiation, is required to be followed. However, it cannot be said that the Supreme Court also intended to lay down an inexorable principle that the promotees promoted on ad hoc basis before December, 1987 in excess of maximum 50% available to the promotees, on their subsequent regularisation after 1988 Rules came into force, were also to be given seniority from the date of their ad hoc promotion. Such interpretation would rather militate against the observation of the Supreme Court that the direct recruits are ensured 50% of the posts at all times.

50. In view of the discussion, the inevitable conclusion is as follows :-
(A) Promotees who had been regularised by December, 1987 should be in the seniority list on the basis of continuous officiation.
(B) Ad hoc promotees within permissible 50%, who were regularised after 1988 Rules came into force can claim seniority from the date of their ad hoc promotion, provided their selection was otherwise in accordance with the 1961 Rules. However, ad hoc promotees promoted before December, 1987 in excess of maximum permissible 50% of the post, on their subsequent regularisation after 1988 Rules came into force can claim seniority from the date of regular promotion and not from the date of their ad hoc promotion.
(C) The seniority of a direct recruit can be counted from the date of appointment.
(D) There is nothing in 1988 Rules to indicate that seniority has to be fixed on the basis of principle of rotation. Therefore, to the extent, a particular appointment is within the quota earmarked in 198 8 Rules seniority has to be counted from the date of the substantive appointment and if there has been any appointment in excess of the quota for a particular year, for a particular category, obviously such a person must be pushed down and should be adjusted against the quota of the category concerned during the subsequent years.
(E) Seniority need not be on the basis of rotation unless there is any specific instruction to that effect validly issued after coming into force of 1988 Rules and the Department cannot fall back on the instructions which had been issued before 1961 or before 1987 as it cannot be said that such instructions are in vogue even after new Rules have come into force.

51. The Supreme Court has recognised the right of an employer to give ad hoc promotion notwithstanding that draft rules had not been finalised or even draft seniority list had not been finalised on some reasonable basis. However, if any such ad hoc promotion is given, it is obvious that such ad hoc promotion would not give any substantive right to such person and such person is liable to be reverted on subsequent finalisation of the seniority list and regular promotion of any senior officer. This observation is being made in view of the submission that many

promotional posts are lying vacant. As a matter of fact, in the affidavit it has been clarified by the Union Government that only ad hoc promotion is intended to be given.

52. In view of the aforesaid conclusions, the prayer made in various writ petitions are to be specifically considered.
Prayer in W.P.No.26975 of 2005 is for issuing a writ of Certiorarified Mandamus for quashing the order dated 9.8.2005 and further directing the respondents 2 to 4, namely, Union of India and other officials, to finalise the seniority list in the light of objections made by the petitioner before making promotion to the post of Assistant Commissioner of Customs and Central Excise (Group A) Post.
Similarly, in W.P.Nos.39564 of 2005 and 39583 of 2005, prayer has been made for quashing the common order dated 9.8.2005 passed by the Tribunal and for quashing the seniority list dated 16.12.2004.

53. The Tribunal has observed that the concerned promotees have to await the decision of the Bombay High Court or get themselves impleaded there to pursue their remedy. The stand of the Union of India is that seniority list is being finalised but the Union of India is keen to promote persons on the basis of draft seniority list which would be subject to the finalisation of the seniority list. The main contention of the promotees is that on the basis of continuous officiation from the date of ad hoc promotion they should be considered as seniors to the direct recruits who have been appointed subsequently.

54. This contention is not acceptable in view of the analysis of position of law made earlier to the extent, any promotee who had been promoted before December, 1987 within the maximum 50% available for the promotees, his seniority can be counted from the date of continuous officiation, whereas, a promotee promoted on ad hoc basis before December, 1987 in excess of 50% and regularised against a regular vacancy after 1988 Rules came into force, cannot claim seniority. In view of the specific stand of the Union of India that it is only contemplating to give ad hoc promotion on the basis of the draft seniority list, the promotees cannot be said to be aggrieved as the question of regular promotion would obviously depend upon subsequent finalisation of the seniority list. While giving any such promotion, the Union of India should make it clear that the promotion is ad hoc subject to finalisation of the seniority list.
Subject to these observations, W.P.Nos.26975, 39564 and 39583 of 200 5 are disposed of.

55. So far as W.P.No.15158 of 2002 is concerned, such writ petition is to be allowed and the order or the Tribunal cannot be upheld in view of the position of law analysed earlier.

56. In the result, W.P.Nos.26975, 39564 and 39583 of 2005 are disposed of subject to the observations made above and W.P.No.15158 of 200 2 is allowed. There would be no order as to costs. Consequently, the connected miscellaneous petitions are closed.

To

1. The Central Administrative Tribunal
rep. by its Registrar,
City Civil Court Buildings,
Chennai 104.

2. The Union of India,
rep. by the Secretary to Government,
Department of Revenue, North Block, New Delhi.

3. The Chairman,
Central Board of Excise and Customs
Department of Revenue,
Ministry of Finance, New Delhi 1.

4. The Chief Commissioner of Customs,
Custom House, Chennai.